

*United States Court of Appeals
for the Second Circuit*



**PETITIONER'S
BRIEF**

No. 74-1762

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United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

S. H. KRESS AND COMPANY,

Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR
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STATEMENT OF ISSUES

Whether the Board properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the duly certified representative of its employees.

STATEMENT OF THE CASE

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), for enforcement of its order (A. 70)¹ issued against respondent S. H. Kress and Company (herein, the "Company") on March 26, 1974. The Board's decision by Members Fanning, Kennedy and Penello, is reported at 209 NLRB No. 117. This Court has jurisdiction of the proceedings, the unfair labor practices having occurred in New York, New York.

I. THE BOARD'S FINDINGS OF FACT

The Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union,² which had been certified by the Board as the exclusive bargaining representative of the Company's employees following the representation proceeding described below.

A. The representation proceeding

On February 22, 1972, the Union filed a representation petition with the Board seeking to represent a bargaining unit comprised of the Company's employees at its Third Avenue store (A. 268). On March 10, 1972, a representation hearing was held during which the parties

¹ "A." references are to the printed record. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence. As the Board's order is based in part on findings made in a representation proceeding under Section 9 of the Act (Board Case 2-RC-15824), the record in that proceeding is before the Court pursuant to Section 9(d) of the Act.

² District 65, National Council Distributive Workers of America.

stipulated to the appropriate unit (A. 72; 621-625).³ On March 27, 1972, the Regional Director issued his decision directing an election in the stipulated unit (A. 4-7).

At the election conducted on May 5, 1972, 25 votes were cast for the Union and 23 votes against, with 6 ballots challenged (A. 8, 72-73). Thereafter, the Company timely filed objections to conduct alleged to have adversely affected the election (A. 8, 73). On July 28, 1972, the Regional Director issued a Supplemental Decision in which he overruled the Company's objections, sustained 2 of the challenges, and overruled the remaining 4 challenges (A. 73).

On September 1, 1972, the Company filed with the Board a request for review of the Regional Director's Supplemental Decision (A. 73; 87). Subsequently the Board, on October 16, 1972, granted review as to two of the Company's objections and as to 4 challenged ballots and remanded the proceeding to the Regional Director for hearing (A. 73; 33). The Board denied the Company's request for review in all other respects (*ibid.*). The Company thereafter filed with the Board an additional motion requesting that the Board reconsider its order of October 16, 1972, which the Board, on October 27, 1972, denied as lacking in merit (A. 73).

A hearing was held on December 6, 7, 8, 18, and 26, pursuant to the Board's remand (A. 73). On May 26, 1973, the Hearing Officer issued his Report and Recommendations in which he recommended that the Company's objections be overruled, that 4 challenges be overruled

³ All employees employed by the Employer at its retail store located at 1915 Third Avenue, New York, New York, including cashiers, porters, maintenance, stock, food service, sales and office clerical employees, but excluding display employees, professional employees, guards and supervisors as defined in the Act.

and that these ballots be opened and counted (A. 73; 44-66). The Company filed timely exceptions to the Hearing Officer's report (A. 73; 84-85). On June 28, 1973, the Board issued its decision directing the Regional Director to open and count the challenged ballots and issue an appropriate certification in which, after considering the Company's exceptions, it adopted the Hearing Officer's findings and recommendations (A. 70-81). The revised tally indicated that 28 votes had been cast for the Union and 25 against (A. 74). Accordingly, the Union was certified as the collective-bargaining representative of the Company's employees in the stipulated unit.

B. The unfair labor practice proceeding

The Company refused the Union's subsequent requests to bargain and on August 1, 1973, the Union filed unfair labor practice charges (A. 72-74). On August 31, 1973, the Regional Director issued a complaint alleging that the Company had engaged in and was engaging in conduct violative of Section 8(a)(5) and (1) of the Act (A. 70). On September 10, 1973, the Company answered the Board's complaint, admitting that it had refused to bargain, but denying the validity of the Board's certification (A. 71). The General Counsel then filed a motion to transfer the case to the Board and a motion for summary judgment (A. 71; 34-40). On October 4, 1973, the Board issued an order transferring the proceeding to itself and a notice to show cause why the General Counsel's motion for summary judgment should not be granted (A. 71; 41). The Company thereafter filed a response to the Board's notice to show cause reasserting the validity of its initial objections and ballot challenges.

II. THE BOARD'S DECISION AND ORDER

On March 24, 1974, the Board granted the General Counsel's motion for summary judgment finding that all issues raised by the Company were or could have been litigated in the prior representation proceeding; that the Company did not offer newly discovered or previously unavailable evidence or special circumstances requiring reexamination of the determination in the representation proceeding; and that the Company had not, therefore, raised any issues which were properly litigable in the unfair labor practice proceeding (A. 70-75). Accordingly, the Board found that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act (A. 79).

The Board's order requires the Company to cease and desist from the unfair labor practices found, and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act (A. 79-81). Affirmatively, the order requires the Company to bargain with the Union, upon request, and to post appropriate notices (A. 80-83).

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE DULY CERTIFIED REPRESENTATIVE OF ITS EMPLOYEES.

A. Introduction

The Company has refused to bargain with the Union in order to test the validity of the Board's decision to overrule its election objections and challenges and to certify the Union. Accordingly, if the Board's certification of the Union is valid, the Company's admitted refusal to

bargain violated Section 8(a)(5) and (1) of the Act. *Polymers, Inc. v. N.L.R.B.*, 414 F.2d 999, 1001 (C.A. 2, 1969), cert. denied, 396 U.S. 1010. See also *Magnesium Casting Co. v. N.L.R.B.*, 401 U.S. 137, 139, 141-142 (1971). The sole issue presented by this admitted refusal to bargain is whether the Board has acted within the "wide degree of discretion" (*N.L.R.B. v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946)) entrusted to it by Congress in resolving questions arising during the course of representation proceedings. As this Court recently stated, "[t]he conduct of representation elections is the very archetype of a purely administrative function, with no *quasi* about it, concerning which courts should not interfere save for the most glaring discrimination or abuse." *N.L.R.B. v. Olson Bodies, Inc.*, 420 F.2d 1187, 1189 (C.A. 2, 1970), cert. denied, 401 U.S. 954.

Thus, where, as here, it is alleged that preelection conduct rendered the election invalid, the burden of proof is on the objecting party to show by specific evidence that the election was not fairly conducted, or that preelection conduct has significantly prejudiced the fairness of the election. *N.L.R.B. v. Mattison Machine Works*, 365 U.S. 123, 124 (1961); *Polymers, Inc. v. N.L.R.B.*, *supra*, 414 F.2d at 1001. As we show below, the Board did not abuse its discretion in finding that the Company failed to meet this burden in the instant case.

**B. The Board properly overruled the
Company's objections 5 and 7 following hearing**

1. Objection 5 – The alleged electioneering by a Union official

The Company contended that the Board should have set aside the election under its *Milchem* rule,⁴ holding that upon proper objection an

⁴ *Milchem, Inc.*, 170 NLRB 362, 363 (1968).

election normally will be set aside because of "prolonged conversations between representatives of any party to the election and voters waiting to cast ballots . . . without inquiry into the nature of the conversations." The Board noted in *Milchem*, however, that "this does not mean that any chance, isolated, innocuous comment or inquiry by an employer or union official to a voter will necessarily void the election." Similarly, the *Milchem* rule has been held not to apply to electioneering during an election which is at a sufficient distance from the polling area or from voters waiting to vote. *Harold W. Moore & Son*, 173 NLRB 1258 (1968); *Marvil International Security Service*, 173 NLRB 1260 (1968).

The Board properly concluded that the evidence adduced at the hearing here fell short of establishing a *Milchem* violation. Thus, the election was held between 2:30 and 5:00 p.m. in the conference room on the second floor of the Company's Third Avenue store (A. 45-46; 242-243, 262). A staircase leads down to a mezzanine, which is used as an office area (A. 45; 262). The staircase continues from the mezzanine to the main floor (A. 45-46; 262-264). The Board agent in charge of the election advised the parties that the "election area" would include: the area surrounding the second floor conference room, which would be the polling place; the ladies lounge on the second floor; the mezzanine; the entire stairway from the second floor to the main floor; and the area around the service desk on the main floor, which is adjacent to the stairway (A. 45-46; 140, 141, 236, 262-264, 630). The parties were instructed not to electioneer in this area during the hours of the election (A. 46; 141). Union Vice President Abreu was near the public telephones, which are adjacent to the service desk, from 2:30 to 2:35 p.m., and thereafter, he was at the lunch counter — which is on the same aisle as the service desk but is separated by the store entrance — until 2:45 p.m., when he left the store (A. 47; 552-553). During this time Abreu spoke briefly to 2 of 51 eligible voters (A. 48).

The Board noted that Abreu's contact with the voters was at "a point on the outside fringe of the no electioneering area" which was "two floors below the polling place, out of sight of the polling place, and the voters waiting in line to vote" (A. 48-49). Such conduct is a far cry from that denounced in *Milchem*, for as the Ninth Circuit observed in *Sonoco Products Co. v. N.L.R.B.*, 443 F.2d 1334, 1337 (C.A. 9, 1971): "On its facts, *Milchem* refers to 'prolonged conversations' with voters 'waiting' in line 'to cast ballots', and concludes that 'a five minute conversation' was not *de minimis*." In these circumstances, the Board clearly did not abuse its discretion here when it determined that these facts do not make out a violation of the *Milchem* rule.

2. Objection 7 – The alleged pro-union activities of Guzman and Feliciano

The Company contended that the pro-union activities of Company supervisors Josephine Guzman and Haydee Feliciano so coerced employees as to deprive them of the opportunity to "make a free and uninhibited choice in this election" (A. 84-86, 118). Guzman and Feliciano were each in charge of a department, and their primary responsibilities were to insure that the counters were kept neat and the positions were manned (A. 52; 368, 400-404, 595, 607-608). Pursuant to this responsibility, they assigned the work of 4 and 8 employees respectively, but they did not hire, fire, discipline, promote, reward, or give employees permission to leave work early (A. 52; 401-402, 405-409, 607-608). Aside from assigning tasks to others, they did essentially the same work as the other salespeople in their departments (A. 52; 405-409, 607-608).

Guzman attended two union meetings prior to March 10, 1972. At the second meeting she was elected to the Union's organizing committee, but she performed no duties on behalf of that committee (A.

49; 368, 379-380). During the same period Feliciano attended one union meeting and solicited one employee to sign a card (A. 51; 595-596). On March 10, 1972, at the representation hearing, the Company and the Union stipulated that Guzman and Feliciano were supervisors and hence excluded from the unit (A. 51). Guzman, who was present at the hearing, was advised immediately by the Union that she should cease all pro-union activity, and Feliciano was similarly advised by the Company shortly afterward (A. 51, 52-53; 373-374, 598-599). Both Guzman and Feliciano refused to assist the Company in its anti-union campaign — which included the transfer to the Third Avenue store of a Spanish-speaking store manager from Florida and the distribution of a large number of leaflets (A. 51; 163-181) — but agreed to remain neutral (A. 51; 374-375, 598-599). No evidence was offered that either Guzman or Feliciano engaged in any activity on behalf of the Union between March 10, 1972, and May 5, 1972, when the election was held (A. 54).⁵ On this record, the Board was clearly justified in finding that "the limited activities of Guzman and Feliciano, low level supervisors, followed by a 2-month hiatus, did not prevent employees from exercising their freedom

⁵ The Company offered the testimony of employees Antonia Garcia and Lydia Matias that they observed Guzman and Feliciano attending Union meetings and engaging in various additional pro-union activities (A. 50-52; 351-355, 631-633, 647-649). The hearing officer discredited this testimony noting, among other grounds, the demeanor of the witnesses, as well as the inconsistent statements made by Garcia and Matias (A. 50-52). As this Court has repeatedly stated, ordinarily "questions of credibility are for the trier of fact. . ." *Amalgamated Local Union 355 v. N.L.R.B.*, 481 F.2d 996, 1005 (C.A. 2, 1973), and cases cited therein. Nothing in this case warrants a departure from that general rule.

of choice in the election," and thus "provide no basis for setting aside this election" (A. 54).⁶

**C. The Company's remaining objections were
properly dismissed without hearing**

The Company's remaining objections, insofar as they remain in issue, alleged that the Union (1) engaged in misrepresentations respecting its dues and benefits; (2) "circulated false information", "injected issues designed to instill racial discrimination and hatred into its campaign," and attempted to "convince employees that federal and local governments favored the Union", and (3) interfered with the election by bestowing or promising benefits to employees and by "spreading false rumors of victory in advance" (A. 84-86, 98-122). As we show below, the Board properly denied the Company's request for review with respect to these allegations affirming the Regional Director's administrative determination that they were without merit.

1. Objection 1, - the alleged misrepresentations

A party alleging that election misconduct has occurred and seeking a hearing on issues raised by such alleged misconduct bears a "weighty"

⁶ The Board rejected as untimely the Company's belated contention – Objection 8 (A. 24-26) – that the Union's pre-election "showing of interest" by employees in having the Union represent them was tainted by the participation of Guzman and Feliciano. It might be noted, however, that the basis for this contention – namely, the evidence that Guzman and Feliciano secured a significant number of union authorization cards – was considered and discredited in the course of evaluating Objection 7 (A. 50, 52). In any event, it is well-settled that a union's support is appropriately determined by the employees' vote in a secret ballot election, and the showing of interest, which is an administrative requirement designed to conserve the Board's resources, is not litigable. *Intertype Co. v. N.L.R.B.*, 401 F.2d 41, 43 (C.A. 4, 1968).

burden of proof. *Henderson Trumbull Supply Corp. v. N.L.R.B.*, ___ F.2d ___, 86 LRRM 3121, 3125 (C.A. 2, 1974); Accord: *Bausch & Lomb, Inc. v. N.L.R.B.*, 404 F.2d 1222, 1226 (C.A. 2, 1968). As this Court observed in *Henderson Trumbull* (86 LRRM at 3125):

Of necessity the existence of such an issue depends greatly upon the nature of the misrepresentation relied upon by the challenging party and upon the surrounding circumstances. Among the factors to be considered besides the materiality of the factual misrepresentation itself are (1) the influence that it might reasonably have had upon the employees, (2) the extent to which the declarant could reasonably be viewed by the employees as a person in a position to know the facts, (3) the opportunity for reply, and (4) the ability of the employees to evaluate the statement on the basis of their own independent knowledge of the facts.

As we show below, the Board properly determined that the misrepresentations alleged here, when assessed in light of the foregoing factors, did not warrant setting the instant election aside.

a. The Union's dues and fees

The Company alleged that the Union misrepresented its fees and dues to employees and submitted in support of this objection a leaflet in which the Union stated that ". . . the initiation fee to be a member of this Union is \$5.00 and the dues are in proportion to your weekly salary" (A. 10; 31-32, 84, 98-103). The Company further alleged that the Union's constitution provides, in fact, for an initiation fee of \$20.00 and, in addition, that the various types of assessments, which, when owing, are taxable as dues, are not assessed in proportion to employees' weekly salary, though the Union's general dues are so assessed (*Ibid.*).

The Regional Director determined that the Union's initiation fee at the time of organization is \$5.00 and that the \$20.00 amount provided for in its constitution pertains only to employees who join at a later date and in addition, that the Union correctly stated that "dues" are in proportion to employee salary (A. 10-12).⁷ The Regional Director further found (A. 11-12) that while Section 2(b)(4) of the Union's Constitution does broaden the definition of dues to include initiation fees, fines and assessments, and these financial obligations do not correlate with employees' earnings, the slight ambiguity which may exist plainly does not warrant a finding that the departure from the facts prevented employees from exercising free choice in the designation of a representative (A. 12). Moreover, he found that "dues ultimately became a significant campaign issue and the subject of extensive analysis in the Company's campaign literature, which at one point quoted Section 2(b)(4) wherein dues includes other assessments" (A. 165).

In its exceptions to the Regional Director's findings, the Company asserted (A. 99), that the Union's statement concerning initiation fees was a misrepresentation even on the facts as found by the Director, because the leaflet (A. 31) "fails to state that the \$5.00 initiation fee applies only during the organization period . . ." and hence failed to advise the employees that they might be subject to higher fees later. As the Director found, however, the Company furnished employees with excerpts from the Union's constitution, which advised them that higher initiation fees *could* be charged. On the other hand, the Union's assurance

⁷ Part IV, Article C, Section 2(a)(1) of the Union's constitution does in fact, provide that "monthly dues" are in proportion to "total earnings" (A. 128-133). Section 2(b)(4) provides, however, that "All initiation fees, assessments, fines, or other obligations owing by any member to the Union shall be merged with and become part of the dues owing by the member" (A. 133).

to *these* employees that *they* could join for \$5.00 is not rendered false by the constitutionality of charging them a higher fee after the "organizational period", which is not specified. The Company's suggestion (A. 99) that the initiation fee was raised immediately after the election is completely unsupported by either the Director's finding or any proffer of evidence.

In addition, the Company argued in its exceptions (A. 101-102) that the information concerning the Union's fees which the Company supplied to the employees was rendered ineffective by the Union's later referring to the Company as a "liar." The specific statements which the Union attributed to the Company and characterized as false — that the Union's initiation fee was "\$100, \$200, [or] \$500" and that the Company would close the store if the Union won the election — do not impugn the authenticity of the references to the Union's constitution by the Company. Accordingly, we submit that the Board properly affirmed the Director's reliance on this document as advising employees as to the maximum initiation fee and the possibility of assessments in addition to dues (A. 128, 131-133).

b. The Union's security plan

The Company alleged that the Union misrepresented to employees that all of its existing contracts contained its "Security Plan" — a package of benefits covering health, welfare and related items (A. 13-15, 84, 103-107). After investigating this objection, the Regional Director noted (A. 14-15) that only two of the five employee witnesses tendered in support of this objection supported the Company's position, but further noted that assuming *arguendo*, the statement was made, the Company had failed "to meet its burden of establishing that the claim was inaccurate, to say nothing of proving that the inaccuracy, were there one,

constituted so substantial a departure from the truth as to make a fair election impossible . . ." (A. 15). In the latter connection, the Director noted that the Company's campaign propaganda stressed that "THE UNION CAN GUARANTEE YOU ABSOLUTELY NOTHING AND THE UNION KNOWS IT" (A. 15, n. 8; 170, 176-177, 178).

In its exception to this finding, the Company took the position (A. 105-106) that *any* inaccuracy in this respect would require the Board to set aside the election and that an item in the Union's newspaper (A. 134) which set out *wage* increases secured by the Union in a contract for a 5-man unit at the National Letter Shop constituted a *prima facie* showing that this contract did not provide the Security Plan, since the news item did not refer to the Plan as an element in the contract. We submit that under the principles set out *supra*, p. 11, the Board properly affirmed the Regional Director's conclusion. The failure to mention this supposedly standard benefit in a description of the contract intended for the Union's own membership is hardly proof that the contract lacked such a term. Moreover, the inaccuracy which the Company seeks to establish — namely, the failure to incorporate the Security Plan in a contract for a single, small unit — would hardly be grounds for setting aside this election, particularly in view of the Company's bringing home to employees the difficulty which the Union faced in obtaining *any* benefits.

2. Objections 2 and 4 – The visit of Congressman Badillo

About May 2, 1972, Union Vice President Abreu brought United States Congressman Herman Badillo, as well as New York Human Rights Commissioner Irma Santella, to the Company's Third Avenue store to meet and talk with the employees at their work stations (A. 16; 136). In its Objections 2 and 4, the Company alleged that Congressman Badillo,

in the course of his conversations with employees, asserted that the Company discriminated against Puerto Ricans by failing to promote them to supervisory or managerial positions (A. 107, 108). The Company alleged that this statement interfered with the election because: (1) it interjected race hatred into the campaign; (2) it was false, since several of the department managers "have names that are unmistakably Spanish (A. 108-111); and (3) the utterance, along with other remarks encouraging the employees to vote for the Union, constituted a representation that the Union was supported by the Federal Government. In ruling on this objection, the Regional Director assumed that the statement was made as alleged by the Company and that it was false, but found that the conduct was not objectionable.

In *Sewell*⁸ the Board held that it would set aside an election where a party's appeals "to racial prejudice or matter unrelated to the election issues . . . create conditions which make impossible a sober, informed exercise of the franchise." On the other hand, the Board has declined to apply *Sewell* to racially-oriented appeals stressing the issue of social and economic equality, holding that campaign appeals to racial consciousness are permissible when the purpose is, not to inflame race hatred, but to encourage concerted activity. See, for example, *Baltimore Luggage Company*, 162 NLRB 1230 (1967), enforced, 387 F.2d 744, 746 (C.A. 4, 1967). Under this test, an employer's promotion policy with respect to members of a minority group is certainly an appropriate campaign topic, and the Company can hardly contend that the issue was raised in an inflammatory manner.

⁸ *Sewell Manufacturing Co.*, 138 NLRB 66, 71 (1962).

With respect to the alleged falsity of the charge, as noted, *supra*, p. 8, the department managers are low level supervisors who work directly with the other salespersons to whom they assign duties. Assuming that several of them are of Puerto Rican ancestry, the Regional Director was justified in his finding, affirmed by the Board, that this was "clearly the kind of statement which could be independently evaluated by employees as campaign propaganda since the employees came in frequent contact with supervisors of Puerto Rican ancestry" (A. 17). Cf. *Paula Shoe*, 121 NLRB 673, 675-676 (1958); *Merck & Co., Inc.*, 104 NLRB 891, 892 (1953); Accord: *Linn v. Plant Guard Workers*, 383 U.S. 53, 60 (1966). Finally, it should be noted that no remark was attributed to Congressman Badillo which purported to be other than his personal views, and if he spoke in any capacity, it was as a person of Puerto Rican ancestry. The Company's assertion (A. 110-111) that an election must be set aside simply because a Congressman does not remain "aloof" from matters which directly affect his constituents is clearly unwarranted.⁹

⁹ The Company's statement (A. 110) that the Congressman's remarks here were "no different" from the mayor's conduct in *Henry J. Siegel Co. v. N.L.R.B.*, 417 F.2d 1206, 1214 (C.A. 6, 1969) simply ignores the other links between the employer and the mayor in that case as well as the actual contents of mayor's statements. Thus, as the court found, the mayor and the town had provided the employer with financial inducements to open the plant, and the day before the election, the Company's president stated that the opening of the plant "was a kind of partnership" between the community and the company. Accordingly, the court affirmed the Board's finding that the mayor's statements to employees that the company would close the plant if they selected a union was an unlawful threat by him as an *agent of the company*. In short, it was, not the political relationship between the employees and the mayor, but the business relationship between the town and the employer which was significant; and the mayor's statements were unlawful, not simply because he commented on the election, but because he made comments which, when *attributable to an employer*, are in violation of the Act.

3. Objections 3 and 6 – the alleged payment and offers of benefit and the Victory Party

The Company alleged (A. 9, 85) that the Union paid the employees to influence their votes. The investigation revealed that several employees were elected to represent their fellow employees on an employee committee. The Union requested the committee members to attend the Board's pre-election hearing and paid them a normal day's pay. One of the committee members, Epifanio Diaz, had not in fact lost a day's pay, since the day of the hearing was his day off (A. 139).

Of course, a union is not precluded from paying employees "reasonable sums" (*Collins & Aikman Corp. v. N.L.R.B.*, 383 F.2d 722, 729 (C.A. 4, 1967)) for assisting it, and hence such pre-election payments are grounds for setting aside an election only where they are "intended to or would influence the election and thus impair a free choice on the part of the employees." *N.L.R.B. v. Commercial Letter, Inc.*, 455 F.2d 109, 111 (C.A. 8, 1972). As the Company tacitly concedes, the amount of the payment here was reasonable, and insofar as appears, the Union's purpose was to reimburse the committee members for the wages lost when they attended the Board hearing. Thus, the statement which Company counsel took from Diaz does not even suggest that he advised the Union that he had not lost a day's pay (A. 139), and hence, insofar as the Union was aware, Diaz was being compensated on the same basis as the other committee members. The Company's assertion (A. 112) that the payment was made "to make it appear that [Diaz] was a union advocate" is unwarranted for the further reason that Diaz was selected, not by the Union, but by his fellow employees after he had already evidenced union support. Finally, we submit that even if the Union were aware that Diaz was not scheduled to work on the day of the hearing, paying him his regular rate for attending the hearing — and giving up his day off — would have been no more than reasonable compensation.

The Company also submitted the statement of employee Benardo Martinez to the effect that the Union, through a pro-union employee, had offered him a 7-day, all-expense, excursion to Puerto Rico if he would vote for the Union. The investigation revealed no evidence either to corroborate this statement or to indicate that any other employee was made such an offer. Nor does the statement by Martinez give the slightest indication that he took any action based on this alleged offer other than to give the Company a statement concerning it. Indeed, the Union challenged Martinez' ballot, alleging that he was a managerial employee, and when the Regional Director sustained that challenge, the Company took exception to the Board and succeeded in having his ballot counted (A. 58-61). Such an offer to a single employee, which could have had no impact on the results, clearly affords no basis for setting aside the election, even if the statement by Martinez were credited.

In response to the Company's objection that the Union "induced employees to vote for the Union by spreading false rumors of victory" the Regional Director's investigation revealed that the Union's vice president, Abreu, had promised the employees a Victory Party after the election. The Director further found that even if the Union had offered to pay the entire cost of the party, such a "benefit" would not warrant setting aside the election. In its exceptions to the Director's report, the Company asserts (A. 113) that the vice in this conduct lay, not in the Union's offer to pay for the party, but in the implication in the announcement of the party itself that the Union had "already won so that a vote against it would be useless." Of course, like any candidate for election, a union may seek to create an aura of success, and efforts in this direction — particularly those which, like the Union's conduct here, involves not the slightest misrepresentation of existing fact — do not warrant setting aside the election. Cf. *N.L.R.B. v. Golden-Age Beverage Company*, 415 F.2d 26, 28, 30 (C.A. 5, 1969).

**4. Objections 1, 2, 3, 4 and 6 were
properly dismissed without a hearing**

Although Section 9(c) of the Act requires that a pre-election hearing be held to determine whether a question concerning representation exists, there is no statutory provision for post-election hearings. The Board will grant such a hearing only if it appears that the objections to the election raise "substantial and material factual issues." This practice, which reflects the requirement that questions preliminary to the establishment of the bargaining relationship be expeditiously resolved, is "not only proper but 'necessary to prevent dilatory tactics by employers or unions disappointed in election returns.' " *N.L.R.B. v. Carolina Natural Gas Corp.*, 386 F.2d 571, 574 (C.A. 4, 1967), quoting, *N.L.R.B. v. Joclin Mfg. Co.*, 314 F.2d 627, 632 (C.A. 2, 1963).

As we show *supra*, pp. 10-18, the Company's objections with respect to which a hearing was denied do not raise a substantial and material issue of fact, for even if the Company's factual allegations as to these objections are accepted as true, the conduct alleged as objectionable is not such as to *prima facie* warrant setting aside the election. Thus, the Board properly overruled Company objections 1, 2, 3, 4, and 6 without a hearing. *N.L.R.B. v. Olson Bodies, Inc.*, 420 F.2d 1187, 1190 (C.A. 2, 1970), cert. denied, 401 U.S. 954; *Bausch & Lomb, Inc. v. N.L.R.B.*, *supra*, 404 F.2d 1222, 1226 (C.A. 2, 1968); *Amalgamated Clothing Workers of America, v. N.L.R.B.*, 424 F.2d 818, 828 (C.A.D.C., 1970).

**D. The Board properly overruled the Company's challenges to
the ballots of Maria Aviles, Sonia Morales and Carmen
Valentin.**

Before the Board, the Company contended that the Regional Director erroneously overruled its challenges of the ballots of Maria Aviles,

Sonia Morales, and Carmen Valentin on the grounds that Morales and Aviles were display department employees (A. 27, 55) and, therefore, excluded from the unit and that Valentin was ineligible because, the Company alleges, she had resigned her job (A. 27, 61). As the Company recognized in its exceptions (A. 94-97), these challenges raise solely factual issues, which the Board decided after hearing.

1. Maria Aviles and Sonia Morales

Aviles and Morales began working as salespersons in 1967 and 1968, respectively (A. 55, 447, 667). In March or early April 1972 — that is, shortly before the election in early May — they were assigned to prepare display signs for use throughout the store, writing numbers on pieces of cardboard with magic markers (A. 56, 447, 463-464, 465, 674). They also prepared several window and indoor displays of merchandise under the immediate direction of Store Manager Marks and Assistant Store Manager Grotheer (A. 56, 450, 453-454, 477-478, 672-674, 676-677). These newly assigned duties took about one-half of each weekday; the remainder of the weekdays and — day Saturday, the busiest day, Aviles and Morales continued their work as salespersons (A. 56-57, 457, 483-484, 667, 680-682).¹⁰ About April 8, 1972, Morales received a raise in pay from \$2.03 per hour to \$2.20 per hour; Aviles, who was already receiving the higher rate, received no raise (A. 57; 450, 686-687). On

¹⁰ The credited testimony of Carmen Valentin and Mary Gomez corroborates Morales' and Aviles' testimony respecting the amount of time which the latter spent working on sales counters on weekdays and Saturdays (A. 57; 499-500, 621-623). Store Manager Marks' assertion that they performed no counter work after their "transfer" to display work was specifically discredited by the Hearing Officer (*Ibid.*).

this record the Board properly concluded that since Aviles and Morales continued to spend over half their time performing unit work, they were "dual function employees, [who] share a community of interest with unit employees, [and] are included within the unit . . ." (A. 58). See *Berea Publishing Company*, 140 NLRB 516, 519 (1963).

2. Carmen Valentin

The Board challenged Carmen Valentin's ballot because her name was not on the eligibility list provided by the Company (A. 27, 61). The Company contends that Valentin resigned from her job prior to the eligibility cutoff date of March 24, 1972. The evidence developed at the hearing may be summarized as follows:

Valentin was scheduled to begin her regular two-week vacation on April 1, 1972 (A. 61-62; 496). Prior to beginning her vacation on that date, she attempted to arrange a part-time work schedule with then Store Manager Williams, explaining that her daughter was going to start working and that she intended to take care of her daughter's baby until arrangements could be made to hire a babysitter (A. 62; 493-494). Williams agreed to this arrangement (A. 62; 494). About March 29, 1972, subsequent to her conversation with Williams, Valentin advised Store Manager Marks, who by this time had replaced Williams, of her arrangement with Williams (A. 62; 494). Marks told her that whatever Williams had agreed to was all right with him (A. 62-63; 494).

Valentin began her vacation on April 1, 1972, as scheduled, but during a visit to the store just prior to returning to work, she was told by Marks that she could not return to work on a part-time basis as previously agreed (A. 63, 496). Following this conversation Valentin arranged to return to work full-time at the conclusion of her vacation (A.

497) and would have done so but for the Company's subsequent assertion that she had resigned her position and would have to be rehired (A. 63; 518-520, 522-523, 525). Valentin called Company President John L. Brown to complain, and Brown assured her that he would speak to Marks (A. 523). Marks subsequently telephoned Valentin and advised her that she could return full-time, but at a new counter since he had assigned another employee to her old counter (A. 64; 441, 523).

Although the Company contends that Valentin had resigned her position and was not on vacation, she received 2 weeks pay during her vacation (A. 65; 531-532) and was not required to fill out a new employment application form, which was the usual practice (A. 65; 431-432, 532). Moreover, upon her return, she received the same rate of pay which she had received prior to her vacation rather than the lower rate customarily paid to new employees (A. 65). Finally, the Company did not hire a new employee to replace Valentin, but merely transferred an employee to her counter and assigned Valentin to that employee's counter when she returned (A. 63; 441, 498). These facts amply support the Board's conclusion that Valentin did not resign her position as the Company alleges, and was, therefore, eligible as an employee "who did not work during [the eligibility] period because [she was] on vacation . . ." (A. 6, 65).

CONCLUSION

For the reasons stated above, it is respectfully submitted that a judgment should be entered enforcing the Board's order in full.

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October, 1974.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,)
)
Petitioner,)
) No. 74-1762
v.)
)
S. H. KRESS AND COMPANY,)
)
Respondent.)

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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Dated at Washington, D. C.

this 23rd day of October, 1974

